

GAO

Office of the General Counsel

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Guide to GAO Protective Orders

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I. Introduction

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(b)(2), as amended, and GAO's Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1997), a contracting agency is required to provide with its report on the protest all relevant documents to the GAO and interested parties. Often these documents contain a company's proprietary or confidential data or the agency's source-selection-sensitive information that cannot be released publicly.

GAO may issue a protective order to allow limited access to such "protected" information to attorneys or consultants retained by attorneys meeting certain requirements. 31 U.S.C. § 3553(f)(2); 4 C.F.R. § 21.4. A copy of section 21.4 of GAO's Bid Protest Regulations is included in Appendix A. The protective order strictly controls who has access to protected material and how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest. Where no protective order is issued, the agency may withhold from the parties the portions of its report which would ordinarily be subject to a protective order; GAO will review *in camera* all information withheld from the parties. 4 C.F.R. § 21.4(b).

II. The Protective Order

A. Protected Information

Proprietary or confidential information, source-selection-sensitive information, or other information, the release of which could result in a competitive advantage to one or more firms, may be protected under a GAO protective order. Material or information identified as protected by any party will be subject to protection under the terms of the protective order, unless GAO specifically provides otherwise. Each party included under a protective order will be entitled to receive a single copy of protected material, which may not be duplicated, except as is incidental to its incorporation into a submission to GAO, or as otherwise agreed to by the parties with GAO's concurrence.

Information identified as protected may only be disclosed by the parties to GAO, the contracting agency, and other individuals admitted under the protective order. Protected material may also be disclosed to support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under the protective order and who are not involved in competitive decisionmaking. It is the responsibility of individuals admitted under the protective order to take all necessary precautions to prevent disclosure of protected material; this includes advising support staff of their obligations prior to providing them with access to protected material. Support staff who are not directly employed or supervised by an individual admitted under the protective order may not be provided with access to protected material; thus, for example, protected material may not be disclosed to individual(s) in a typing service working at locations other than that of the individual admitted under the protective order.

B. Issuance

Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is, in the first instance, the responsibility of protester's counsel to request that a protective order be issued. Any other party may request the issuance of a protective order, however, and GAO may issue a protective order on its own initiative whenever it appears that one is appropriate and the protester is represented by counsel. 4 C.F.R. § 21.4(a). Because only attorneys and consultants they retain may be admitted under a protective order, GAO will generally not issue a protective order, even if the record will include protected information, where the protester is proceeding without an attorney; nor will a protective order be issued where the protester requests that one not be issued.

A protective order package, which includes the protective order and the application(s) for access to material under a protective order, generally

will be issued soon after a protest is filed, and in many cases simultaneously with the protest acknowledgment notice. After issuance, the protective order will apply to all proceedings associated with the protest, *e.g.*, supplemental and amended protests, requests for reconsideration, and claims for costs. A sample protective order can be found in Appendix B.

C. Redactions

It is the responsibility of the party preparing a filing protected under a GAO protective order to submit a version of the filing which omits protected information. This “redacted” version of the protest filing should be provided when the protected version is filed. GAO will resolve disputes if the parties are unable to agree as to the scope of proposed redactions.

In any protest in which a protective order has been issued, a party receiving or sending documents that are not designated as protected, including proposed redacted versions of protected documents, may not release the documents to anyone not admitted under the protective order until the end of the second day following receipt of the document by all parties. This allows parties the opportunity to identify documents that should have been designated as protected material prior to their disclosure to individuals not admitted under the protective order.

D. Disposition of Protected Material

The GAO protective order provides specific instructions regarding the disposition of protected material at the conclusion of a protest. Parties to the protective order are directed that within 20 days after the disposition of the protest (or if a request for reconsideration or a claim for costs is filed, 20 days after the disposition of those matters), all protected material furnished to individuals admitted under the protective order, including all copies of such material, with the exception of a single copy of a protected decision or letter issued by GAO, must be: (1) returned to the party that produced them; or (2) with the prior written agreement of the party that produced the protected material, destroyed and certified as destroyed to the party that produced them; or (3) with the prior written agreement of the party that produced the protected material, retained under the terms of the protective order for such period as may be agreed. Within the same 20-day period, protected pleadings (including copies in archival files and computer backup files) and written transcripts of protest conferences and hearings must be destroyed, and the destruction certified to GAO and the other parties unless the parties agree otherwise; video transcripts produced by GAO must be returned to our Office. In the absence of such

II. The Protective Order

agreement and for good cause shown, GAO may extend the period for retention of the protected material.

III. The Application Process

A. Who Can Apply

Only attorneys, or consultants retained by them, who represent an interested party or intervenor may apply for admission to a GAO protective order. Outside counsel and in-house counsel are eligible for admission to a GAO protective order. Applicants must establish that they are not involved in competitive decisionmaking as that term is defined in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for any company that could gain a competitive advantage from access to protected information and that there will be no significant risk of inadvertent disclosure of protected information. 4 C.F.R. § 21.4(c). “Competitive decisionmaking” is described as:

“[A] counsel’s activities, associations, and relationship with a client that are such as to involve counsel’s advice and participation in any or all of the client’s decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.” 730 F.2d at 1468 n.3.

A copy of the *U.S. Steel Corp.* decision can be found in Appendix C. See also *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 929 F.2d 1577 (Fed. Cir. 1991).

Each individual seeking admission to a GAO protective order must submit a separate application. Individuals permitted access to protected information under a GAO protective order are not allowed to disclose that information to others who are not admitted under the protective order, such as other members of the attorney’s law firm who are not themselves admitted to the protective order or the attorney’s client.

B. the Application

Applicants for admission to a GAO protective order must file the appropriate outside counsel, in-house counsel, or consultant application with GAO. Copies of these applications can be found in Appendix D. Generally, the appropriate attorney’s application will be attached to the protective order issued in a protest. The consultant’s application can be obtained from the GAO staff attorney assigned to the protest.

The application for admission to a protective order will establish that the individual is appropriate for admission (*e.g.*, an attorney retained to represent an interested party in the protest or a consultant retained by such an attorney), is not involved in competitive decisionmaking, and has read the protective order issued by GAO in the protest and will comply in all respects with the terms and conditions of the protective order. A

consultant seeking admission to the protective order may also have to agree to certain future employment restrictions as a condition of receiving access to protected material; while GAO's consultant application suggests certain future employment restrictions, the parties may agree to different or other restrictions.

The failure to accurately complete the application may result in denial and/or revocation of admission as well as other sanctions. For example, counsel's failure to accurately identify, as required, all instances within the last 5 years in which counsel had been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by another administrative or judicial tribunal, resulted in counsel's revocation of admission to a GAO protective order.

C. When to File

Applications for admission to a protective order should be filed as soon as possible after the issuance of the protective order. Delays in filing applications for access to protected material, as well as requests for issuance of a protective order, will generally not provide a basis for extending the time within which comments on an agency report must be filed.

D. Objections

Objections to an applicant's admission to a protective order should be raised within 2 days of receipt of the application. 4 C.F.R. § 21.4(c). In reviewing applications for admission to a protective order, GAO considers and balances a variety of factors, including the nature and sensitivity of the material to be protected, the attorney's need for the confidential information sought in order to adequately prepare the party's case, and whether there is opposition to an applicant expressing legitimate concerns that the individual's admission would pose an unacceptable risk of inadvertent disclosure. *See McDonnell Douglas Corp.*, B-259694.2; B-259694.3, June 16, 1995, 95-2 CPD ¶ 51.

Because the information released under a protective order is not GAO's, but rather the contracting agency's or the other parties', GAO relies upon these parties to timely object to an application for access to protected material. GAO will generally admit an applicant to a protective order where there is no objection raised.

E. the Admission

GAO will issue a written notice identifying all individuals who are admitted under a GAO protective order and who are thus entitled to have access to protected material. Individuals who are denied access to protected material will be informed in writing of the basis of their denial.

1. Outside Counsel

Although it is often easier for outside counsel to establish that they are not involved in competitive decisionmaking, GAO approaches the admission of counsel on a case-by-case basis, and GAO does not assume that any attorney's status as outside counsel is dispositive of whether that attorney is involved in competitive decisionmaking. *Allied-Signal Aerospace Co.*, B-250822; B-250822.2, Feb. 19, 1993, 93-1 CPD ¶ 201.

In *Allied-Signal*, GAO denied access to outside counsel for the awardee, a subsidiary of a parent corporation, because the attorney served as a corporate officer for two other subsidiaries and represented at least nine subsidiaries in the previous 3 years, suggesting that the attorney had a management relationship with the companies that cut across corporate boundaries. The attorney's role as competitive decisionmaker was found to present too great a risk of inadvertent disclosure of protected materials.

In *Mine Safety Appliances Co.*, B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506, GAO admitted the protester's attorneys to a protective order even though they were associated with a law firm in which the managing partner of the law firm's home office served on the protester's board of directors. The attorneys were found to not participate in competitive decisionmaking, vowed not to discuss any protected information with the individual in the firm serving on the protester's board of directors, and agreed to special procedures to protect the information (analogous to the procedures for the protection of classified materials), including using a locked cabinet, maintaining a log and a special data processing file for the protest, and limiting access to the data processing file.

In *Colonial Storage Co.; Paxton Van Lines, Inc.*, B-253501.5 *et al.*, Oct. 19, 1993, 93-2 CPD ¶ 234, GAO denied admission to outside counsel for the awardee where the record established that the attorney was involved in competitive decisionmaking—specifically, the attorney represented the awardee at a pre-solicitation conference and participated in price discussions between the awardee and the agency in the course of the procurement.

In *Ralvin Pacific Dev., Inc.*, B-251283.3, June 8, 1993, 93-1 CPD ¶ 442, GAO did not admit outside counsel employed by protester where there was evidence in the record that these attorneys were involved in competitive decisionmaking—that is, conducting ongoing lease negotiations with the agency on behalf of the protester’s affiliate. The attorneys withdrew their applications for admission.

2. In-House Counsel

In considering applications of in-house counsel, GAO considers such factors as whether the in-house counsel advises on pricing and product design decisions, including the review of bids and proposals, the degree of physical separation and security with respect to those who participate in competitive decisionmaking, and the degree and level of supervision to which in-house counsel is subject. In determining whether access is appropriate, GAO considers not only the applicant’s role with respect to competition for federal government business, but also the individual’s role in the commercial marketplace and to other business activities where corporate decisions are made in light of information about competitors that might be disclosed under a protective order.

In *Robbins-Gioia, Inc.*, B-274318 *et al.*, Dec. 4, 1996, 96-2 CPD ¶ 222, GAO admitted in-house counsel for the awardee over the agency’s objection where the record established that the attorney did not participate in competitive decisionmaking; the fact that the in-house counsel reported to a competitive decisionmaker did not alone demonstrate that there was an unacceptable risk of inadvertent disclosure of protected material.

Admission of in-house counsel to a protective order was denied where, in balancing the need to protect the confidentiality of sensitive information with the party’s need to have access to the information to pursue the protest, GAO found that there was an unacceptable risk of inadvertent disclosure because the in-house counsel advised his company’s competitive strategists and there was no showing that the in-house counsel needed access to the information to help the party pursue its protest. *McDonnell Douglas Corp.*, B-259694.2; B-259694.3, June 16, 1995, 95-2 CPD ¶ 51.

GAO granted access to a senior attorney in a company litigation section where the litigation section was a separate and distinct operation devoted exclusively to litigation and the attorney was “walled off” from competitive decisionmaking. *US Sprint Communications Co. Ltd. Partnership*, B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201.

GAO has denied access to in-house counsel who provide legal counsel to senior company management, such that counsel advises or participates in competitive decisionmaking. *Earle Palmer Brown Cos., Inc.*, 70 Comp. Gen. 667 (1991), 91-2 CPD ¶ 134; *Dataproductions New England, Inc., et al.*, B-246149.3 *et al.*, Feb. 26, 1992, 92-1 CPD ¶ 231; *Bendix Field Eng'g Corp.*, B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227.

GAO denied admission to corporate counsel who was involved in competitive decisionmaking with respect to other business matters such as mergers and acquisitions, where there was more than a minimal risk of inadvertent disclosure of information from the protest concerning the competitor who was involved in the merger talks. *Atlantic Research Corp.*, B-247650, June 26, 1992, 92-1 CPD ¶ 543.

GAO has granted a limited admission to in-house counsel to permit counsel access to counsel's own company's evaluation documents concerning the company's exclusion from the competitive range. By agreement of counsel, the in-house counsel did not receive access to its competitors' proposals and evaluations. *SRI Int'l, Inc.*, B-250327.4, April 27, 1993, 93-1 CPD ¶ 344.

3. Consultants

GAO's policy is to allow protesters to choose the assistance they deem necessary to pursue their protest. In *Bendix Field Eng'g Corp.*, B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227, GAO admitted consultants to a protective order to provide assistance to counsel in their review of the agency's cost realism evaluation where, although the agency objected that the consultants were not necessary, there was no other objection to the admissibility of the consultants.

However, in *EER Sys. Corp.*, B-256383 *et al.*, June 7, 1994, 94-1 CPD ¶ 354, GAO denied admission to consultants for the protester, even though it was unclear that granting access to protected material to these consultants would pose a major risk of inadvertent disclosure, where the protected material was undeniably sensitive and valuable, such that disclosure of the information would cause serious competitive harm to the awardee, the awardee challenged the admissibility of the consultants, and GAO determined that it and the protester could fairly and reasonably address the specific protest issues without the admission of the protester's consultants.

IV. Use of Protected Material Before Other Agencies and Courts

Material to which parties gain access under a GAO protective order may only be used in the protest proceedings for which the protest was issued, absent express prior written authorization from GAO. Requests for authorization to use protected material in other fora must be made in writing, with notice to all parties, and must establish that protected material will be safeguarded, *e.g.*, by the forum's issuance of a protective order.

GAO has generally permitted the use of protected material in the filing of federal lawsuits and before other administrative tribunals where the party seeking to use such material establishes that the material will be safeguarded. For example, GAO has permitted the filing of protected material, which a party received under a GAO protective order, in court pleadings where the court was informed of the GAO protective order and the material subject to the GAO protective order and where a court protective order was issued to protect and govern the protected material. A sample notice of limited leave to release protected material to a federal court is included in Appendix E. The precise nature of GAO's leave to release protected material to another forum will depend upon the circumstances necessary to protect the information in that forum.

V. Sanctions

Any violation of a protective order is a serious matter, whether or not it results in an improper disclosure of protected material. Violations of the terms of a protective order will result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to the appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO.

Violations of GAO protective orders have included instances where protected material has been disclosed, inadvertently or otherwise, to individuals not admitted under the GAO protective order, where unilateral redactions of protected material were provided to individuals not admitted under the protective order resulting in an improper disclosure of protected material, and where protected material was disclosed to other fora without prior permission from GAO. The following case studies illustrate protective order matters that have been raised with GAO:

CASE 1: A protester's counsel violated a GAO protective order by furnishing an agency's report, which was identified as protected material, to a representative of the protester, who was not admitted under the protective order. GAO sanctioned the counsel by restricting counsel's future admission to GAO protective orders for a period of 2 years and referred the protective order violation to the appropriate bar association for its consideration.

CASE 2: Intervenor's counsel unilaterally prepared a redacted version of draft comments counsel was preparing to file in response to an agency's report and provided this redacted version of the draft comments to a representative of the intervenor, who was not admitted to the protective order. This redacted version contained protected information—the protester's pricing information—in violation of the GAO protective order. Although counsel argued that the release of the protected material was inadvertent, it was also argued that counsel have the right to unilaterally prepare and release redacted versions of documents that have not yet been filed with GAO or which were not sent or received from another party to the protest. Protester's counsel violated the protective order requirement not to release a proposed redacted version of a protected document without the affirmative agreement of all other parties or absent GAO's agreement. Given the seriousness of the violation and the poor judgment evidenced, GAO sanctioned counsel by restricting counsel's future admission to GAO protective orders for a period of 3 months.

CASE 3: Protester's counsel unilaterally prepared a redacted version of an agency's report, which was identified as protected under the GAO protective order, and informed the agency that counsel would release the redacted version if not otherwise informed by the agency by the close of the next business day. The agency was unable to object to protester's counsel's proposed redacted version before the release of counsel's redacted version to counsel's client, who was not admitted to the protective order. Counsel's redacted version of the agency's report contained source-selection-sensitive information that was protected under the protective order. Counsel's release of a proposed redacted version of a protected document without the affirmative agreement of all other parties (or GAO's agreement where the parties disagree) was improper. Given that the unilaterally redacted documents did not appear to contain information whose release provided the protester with a competitive advantage or prejudiced the agency or any other party and that it did not appear that the protester's counsel had acted in bad faith, GAO admonished the protester's counsel to ensure that in the future the counsel obtained the affirmative agreement from all parties before releasing a redacted version of a protected document.

CASE 4: Protester's counsel violated the GAO protective order when counsel disclosed protected material to the Small Business Administration as a part of the protester's challenge of the intervenor's small business size status, where the protester's counsel did not obtain GAO's prior approval to use the protected material and did not take steps to ensure the confidentiality of the protected material. GAO revoked counsel's admission to the protective order, directed counsel to immediately return to GAO or destroy all protected material in counsel's possession, and cautioned counsel that any future disclosure of protected material would result in more stringent action by GAO.

CASE 5: While a protest was pending before GAO, protester's counsel filed suit in federal court to enjoin performance of the contract pending GAO's bid protest decision. Protester's counsel represented to the court that he had reviewed the intervenor's proposal, which was protected under a GAO protective order, and that it did not comply with a key minimum mandatory solicitation provision. GAO did not find a violation of the protective order requirement that protected material be used only for the protest proceeding, since counsel only represented to the court his belief as to whether the proposal satisfied the solicitation requirements; the record showed that counsel did not disclose any of the contents of the intervenor's proposal or any other protected information.

CASE 6: Protester's counsel violated a GAO protective order by including protected material in a complaint and memorandum in support of declarative relief filed in a United States District Court, without first contacting GAO regarding the propriety of using the protected material. Protester's counsel did, however, enter into a separate protective arrangement with the court for purposes of the action before releasing the protected material. While a violation of the protective order occurred, a private admonishment letter was issued to the protester's counsel, because counsel had ensured that protected material was not disclosed beyond the parties to the litigation and pursuant to the court's protective order.

CASE 7: Protester's counsel improperly disclosed protected material received under the GAO protective order to another member of counsel's law firm based upon counsel's erroneous belief that the protective application was on behalf of the entire law firm. This violated the GAO's protective order, which expressly provided for admission of individuals who each file separate applications. Protester's counsel was admonished to exercise greater care in the future in the handling of protected material and cautioned that any future violation of a protective order could result in revocation of admission to a protective order and affect future protective order admissions.

CASE 8: After the receipt of an agency's report, which contained protected material, protester's counsel withdrew representation of the protester as a result of a disagreement with the protester. Protester's counsel arranged to have the agency provide a redacted version of the report to the protester, who elected to proceed *pro se* in the protest, and returned the protected version of the agency report to the agency. Inadvertently, the contracting officer's statement, which was designated as protected material, was delivered to the protester along with documents belonging to the protester. Although a protective order violation occurred, protester's counsel appropriately obtained the return of the contracting officer's statement from the protester, who attested the protected document had not been read and assured the GAO that counsel would be more careful in the future regarding the safeguarding of protected material. A private letter of admonishment was issued to protester's counsel.

CASE 9: Protester's counsel released to a representative of the protester documents that were identified as releasable in an agency's report on the date that the report was received. A day after receipt of the report, the

intervenor identified as protected certain material contained within some of the documents which the agency had indicated were releasable. Protester's counsel promptly informed GAO that the protected material had already been released to an individual who was not admitted under the protective order and that all individuals who had wrongly received access to the protected material had, at counsel's instruction, halted further review and destroyed the documents. Counsel violated the protective order requirement to delay release of documents that are not designated as protected material for 2 days following receipt, except to individuals admitted under the protective order. Counsel's failure to abide by this requirement deprived the intervenor of the opportunity to identify documents that should be protected. Counsel was privately admonished.

CASE 10: An intervenor's counsel received a document under a protective order marked "redacted version" but accompanied by a memorandum that informed counsel that the document was redacted for release only to the protester. Intervenor's counsel released the document to a representative of the intervenor, who was not admitted under the protective order and entitled to receive the document. Intervenor's counsel violated the protective order requirement to disclose protected material only to individuals admitted under the protective order. However, because the violation was unintentional and the document was promptly returned by the intervenor whose representative retained no copies of the document, the counsel was privately admonished.

CASE 11: A contracting agency in responding to a protest filed a document containing an offeror's protected material but did not identify that the document contained protected information that should be withheld from individuals not admitted to the GAO protective order. Protester's counsel released this document to representatives of the protester who were not admitted under the protective order. GAO advised the agency that in responding to protests in which protective orders have been issued the agency must be particularly diligent in the identification of protected material to prevent the dissemination of an offeror's proprietary information or the agency's source-selection-sensitive information.

CASE 12: Protester's Counsel A telefaxed a protest pleading, containing protected material, to Counsel B for another protester without including a protective legend as required by the protective order. Both counsel A and B were admitted to the GAO protective order. Counsel B's secretary telefaxed the protest pleading to an intervenor's in-house counsel, who was not admitted to the protective order. The in-house counsel returned

the document without reading it, after being notified of the protective order violation. Counsel A's failure to include a protective legend violated the protective order requirement that protected material be identified and directly resulted in the release of protected material to individuals not admitted to the protective order. A private letter of admonishment was issued to Counsel A.

CASE 13: A consultant retained by a protester's counsel and admitted under a protective order effectively disclosed protected material to a representative of the protester, who was not admitted under the protective order, where the manner in which the consultant asked questions of the protester's representative disclosed, in part, the intervenor's technical approach. Although the consultant and protester's counsel maintain that the information effectively disclosed was not properly protected because it arguably was publicly available, GAO found that the consultant, and the protester's counsel under whose direction and control the consultant performed his tasks, were in violation of the GAO protective order. Information designated as protected by a party remains protected until the parties agree that such information may be removed from coverage of the protective order or GAO informs the parties that the information is no longer protected. Protester's counsel and the consultant were admonished to exercise greater care in the future and that the circumstances of this protective order violation would be considered under any future applications for admission to GAO protective orders.

Appendix A

Sec. 21.4 Protective orders.

(a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report which would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

(d) Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO.

Appendix B

**UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

PROTECTIVE ORDER

This protective order limits disclosure of certain material and information submitted in the above-captioned protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure. Material to which parties gain access under this protective order is to be used only for the subject protest proceedings, absent express prior authorization from the General Accounting Office (GAO). Such authorization must be requested in writing, with notice to all parties.

1. This protective order applies to all material that is identified by any party as protected, unless GAO specifically provides otherwise. This protective order applies to all proceedings associated with the protest, e.g., supplemental/amended protests, requests for reconsideration, and claims for costs.
2. Protected material of any kind may be provided only to GAO and to individuals authorized by this protective order, and must be in a sealed parcel containing the legend "**PROTECTED MATERIAL ENCLOSED**" conspicuously placed on the outside of the parcel containing the protected information. The first page of each document containing protected material is to be clearly marked as follows:

**PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH
GENERAL ACCOUNTING OFFICE PROTECTIVE ORDER**

The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Wherever such protection is claimed for a protest pleading, the party filing the pleading shall submit a proposed redacted version for public release when the protected version is filed.

3. Only individuals who are admitted under this protective order by GAO, and support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under this order, and who are not involved in competitive decisionmaking for a party to the protest or for any firm that might gain a competitive advantage from access to the protected material disclosed under this order, shall have access to information covered by this order. Individuals admitted under this protective order shall advise such support staff, prior to providing them access to protected material, of their obligations under this order.

4. Each party included under this protective order shall receive a single copy of the protected material and shall not duplicate that material, except as incidental to its incorporation into a submission to GAO or as otherwise agreed to by the parties with GAO's concurrence.

5. When any party sends or receives documents in connection with this protest that are not designated as protected, including proposed redacted versions of protected documents, the party shall refrain from releasing the documents to anyone not admitted under this protective order, including clients, until the end of the second day following receipt of the documents by all parties. This practice permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under this protective order.

6. Each individual covered under this protective order shall take all necessary precautions to prevent disclosure of protected material, including but not limited to physically securing, safeguarding, and restricting access to the protected material. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 20 days after the disposition of the protest(s) (or if a request for reconsideration or a claim for costs is filed, 20 days after the disposition of those matters), all protected material furnished to individuals admitted under this protective order, including all copies of such material, with the exception of a single copy of a protected decision or letter issued by our Office, shall be: (1) returned to the party that produced them; or (2) with the prior written agreement of the party that produced the protected material, destroyed and certified as destroyed to the party that produced them; or (3) with the prior written agreement of the party that produced the protected material, retained under the terms of this order for such period as may be agreed. Within the same 20-day period, protected pleadings (including copies in archival files and computer backup files) and written transcripts of protest conferences and hearings shall be destroyed, and the destruction certified to GAO and the other parties, unless the parties agree otherwise; video transcripts produced by GAO shall be returned to our Office. In the absence of such agreement and for good cause shown, the period for retention of the protected material under this paragraph may be extended by order of GAO. Any individual retaining material received under this protective order (except for the single copy of a protected decision or letter issued by our Office) beyond the 20-day period without the

authorization of GAO or the prior written agreement of the party that produced the material is in violation of this order. The terms of this protective order (except those terms regarding the return or destruction of protected material) shall apply indefinitely to the single copy of the protected decision or letter issued by our Office that is retained by a party admitted under this order.

8. Any violation of the terms of this protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting the practice of counsel before GAO. A party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

Assistant General Counsel

Date

United States Court of Appeals for the Federal Circuit

U. S. STEEL CORPORATION, ET AL.,)
)
Appellants,)
v.) Appeal No. 84-639
)
THE UNITED STATES AND U. S.)
INTERNATIONAL TRADE COMMISSION,)
)
Appellees,)
)
AND COSIPA, ET AL.,)
)
Intervenors.)

DECIDED: March 23, 1984

Before MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, and KASHIWA, Circuit Judge.

MARKEY, Chief Judge.

Interlocutory appeal on a certified question arising from a decision of the Court of International Trade (CIT)¹ denying U. S. Steel's (USS) corporate in-house counsel access to confidential information. We vacate and return.

Background

In Republic Steel Corp., supra, note 1, an action involving a negative preliminary injury determination by the International Trade Commission (ITC), the CIT denied a motion for access by USS' in-house counsel to certain confidential information while granting access to counsel retained by other parties. Relying on an earlier decision in U. S. Steel Corp. v. United States, 569 F. Supp. 870 (Ct. Int'l Trade 1983), vacated on other grounds, slip op. 84-12 (Ct. Int'l Trade Feb. 24, 1984), the court reiterated its view that the possibility of inadvertent disclosure by in-house counsel warranted denial of access. 572 F. Supp. at 276. That earlier decision, specifically incorporated into the decision on appeal here, acknowledged USS's need for the information but said that the information's nature and volume required a focus on the possibility of

¹Republic Steel Corp. v. United States, 572 F. Supp. 275 (Ct. Int'l Trade 1983).

inadvertent disclosure. Though it accepted representations that the present in-house counsel are not involved in competitive decisions, the CIT nonetheless denied access to in-house counsel because of their "general position" and "reasonable assumptions that they will move into other roles."

The CIT certified the access question in its decision. 572 F. Supp. at 277. This court granted USS's petition for review of that question on November 10, 1983, under 28 U.S.C. § 1292(a)(1), as amended by Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 125(a), 96 Stat. 25, 36 (1982).

The case has proceeded with access granted to retained counsel and denied to in-house counsel.

The United States joins USS in arguing that the CIT's decision constitutes a per se ban on access by in-house counsel and should be reversed in favor of a case-by-case balancing test without regard to whether counsel are in-house or retained.

The ITC takes no position on the present court-denial of access, but seeks to preserve its right to deny access by in-house counsel at the administrative level. Intervenor Companhia Siderurgica Paulista, S. A. (COSIPA) and Usinas Siderurgicas de Minas Gerais, S. A. of Brazil and Companhia Siderurgica Nacional are exporters of steel products seeking affirmance of the present denial. European exporters filed a brief amici curiae urging affirmance. Bethlehem Steel Corporation filed a brief amicus curiae in support of reversal.

Issue

Whether the CIT erred in denying the present motion for access.

OPINION

The authority of the CIT under 19 U.S.C. § 1516a(b)(2)(B) to control access to confidential information in cases before it is not in dispute.² In exercising that control in this case, the CIT carefully reviewed Atlantic Sugar, Ltd. v. United States, 85 Cust. Ct. 133, C.R.D. 80-18 (1980) and available authorities dealing with access in other fields of law, made clear that its rationale carried no reflection on the unquestioned integrity and unblemished record of USS' in-house counsel in adhering to protective

²19 U.S.C. § 1516a(b)(2)(B) provides:

Confidential or privileged material. – The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

orders, and indicated that retention of outside counsel was a reasonable way for USS to satisfy its recognized need for the requested information. Serving the interest of early and just resolution, the CIT certified to this court the question of whether access may be denied solely because of counsel's in-house status.

Emphasizing congressional concern for confidentiality and the statutory provision, 19 U.S.C. § 1516a(b)(2)(B) for maintenance of confidentiality, the CIT denied access. It did so, however, only to in-house counsel, because of its concern, as it said, "solely with the greater risk of inadvertent disclosure within the corporate setting" (CIT's emphasis).

Because what the CIT called the "extremely potent" information in this case fills several volumes and is intermixed with nonconfidential information, the CIT said "its nature and volume place it beyond the capacity of anyone to retain in a consciously separate category" and that "it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship." The CIT recognized that those statements applied equally to retained counsel, but also recognized that applying it to both in-house and retained counsel would render adversarial proceedings impossible.

The CIT's well-taken concern for the nature and scope of the information would be eminently applicable to (and would doubtless complicate) the crafting of a suitable protective order. That concern, coupled with the CIT's emphasis on protection of confidentiality, might have justified denial of access to all and sundry. Once it became clear that access must be granted, however, it was error to deny access solely because of in-house counsel's "general position" and "reasonable assumptions" that present in-house counsel will move into other positions within USS.

The denial of access here rested on the court's stated general assumption that there is "a greater likelihood of inadvertent disclosure by lawyers who are employees committed to remain in the environment of a single company". Denial or grant of access, however, cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order. Indeed, it is common knowledge that some retained counsel enjoy long and intimate relationships and activities with one or more clients, activities on occasion including retained counsel's service on a corporate board of directors. Exchange of employees between a client and a retained law firm is not uncommon. Thus the factual circumstances surrounding each individual counsel's activities, association, and relationship with a party, whether counsel be in-house or retained, must govern any concern for inadvertent or accidental disclosure.

The CIT distinguished in-house from retained counsel because, as it said, "a clear and more sustained relationship can be presumed as an outgrowth of the employer-employee relationship". It therefore saw exclusion of in-house counsel as providing "a meaningful increment of protection". Like retained counsel, however, in-house

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counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel. The problem and importance of avoiding inadvertent disclosure is the same for both. Inadvertence, like the thief-in-the-night, is no respecter of its victims. Inadvertent or accidental disclosure may or may not be predictable. To the extent that it may be predicted, and cannot be adequately forestalled in the design of a protective order, it may be a factor in the access decision. Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined, as above indicated, by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained.³

Meaningful increments of protection are achievable in the design of a protective order. It may be that particular circumstances may require specific provisions in such orders. In such cases, the order would be developed in light of the particular counsel's relationship and activities, not solely on a counsel's status as in-house or retained.

In a particular case, *e.g.*, where in-house counsel are involved in competitive decisionmaking, it may well be that a party seeking access should be forced to retain outside counsel or be denied the access recognized as needed. Because the present litigation is extremely complex and at an advanced stage, and because present in-house counsel's divorcement from competitive decisionmaking has been accepted by the CIT, forcing USS to rely on newly retained counsel would create an extreme and unnecessary hardship.

Our decision here bears no relation to, and can have no effect on, ITC's rule establishing a *per se* ban on disclosure to in-house counsel in its administrative proceedings. That rule is not before the court. The policy of an administrative agency faced with specific tasks and deadlines cannot of course control a trial court's discretion in managing the litigation before it. Congress has granted discretion to control access to confidential information, in cases like the present, to the CIT. Whether the exercise of that discretion in the course of litigation would unacceptably "chill" the willingness to disclose such information at the administrative level is a matter for the Congress. On the other hand, our holding here, that access by retained

³The parties have referred to involvement in "competitive decisionmaking" as a basis for denial of access. The phrase would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.

as well as in-house counsel should be governed by the facts, may serve to reassure disclosers of confidential information.

It is unnecessary for us to resolve the parties' dispute over whether the apparent emphasis on confidentiality in 19 U.S.C. § 1516a(b)(2)(B), or the asserted emphasis on discovery in Rule 26, Fed.R.Civ.P. should control in this case. Though the requirement to consider the facts rather than status of counsel sounds in Rule 26 terms, it relates here only to cases in which the court has decided to grant access in accord with the authorization in the second sentence in 19 U.S.C. § 1516a(b)(2)(B), supra, note 2. Nothing here said diminishes the clear authority of the CIT to deny access to all where the specific facts indicate a probability that confidentiality, under any form of protective order, would be seriously at risk. We do not here reverse the denial of access from which the certified question arose. Nor do we order a grant of access in the case listed in note 1, supra. We hold only that status as in-house counsel cannot alone create that probability of serious risk to confidentiality and cannot therefore serve as the sole basis for denial of access.

We have considered and find it unnecessary to discuss the arguments: that the CIT was here creating a per se rule requiring denial to all in-house counsel of access to any confidential information in all future cases; that the denial of access here constituted a violation of USS' right to choice of counsel or a disenfranchising of counsel without due process; that Rule 26, Fed. R. Civ. P., rather than 19 U.S.C. § 1516a(b)(2)(B), should have been applied; and that the "staleness" of the information sought should dictate access.

CONCLUSION

The certified question (whether access may be granted to retained and denied to in-house counsel solely on a presumption that inadvertent disclosure by the latter is more likely) is answered in the negative, i.e., a denial of access sought by in-house counsel on the sole ground of their status as in-house counsel is error. In further proceedings, access should be denied or granted on the basis of each individual counsel's actual activity and relationship with the party represented, without regard to whether a particular counsel is in-house or retained.

DECISION

In light of the foregoing, the order denying access to in-house counsel in the case listed in note 1, supra, must be vacated, and the question returned.

VACATED and RETURNED

84-639

United States Court of Appeals for the Federal Circuit

U. S. STEEL CORPORATION, ET AL.,)	
)	
Appellants,)	
v.)	Appeal No. 84-639
)	
THE UNITED STATES AND U. S.)	
INTERNATIONAL TRADE COMMISSION,)	
)	
Appellees,)	
and)	
)	
COSIPA, ET AL.,)	
)	
Intervenors)	

NICHOLS, Senior Circuit Judge, dissenting.

I would affirm because I am not persuaded that CIT Judge Watson abused his discretion. His decision has two things going for it this court does not mention. First, he conforms practice in his court to that of the ITC. We may say the ITC rule is not before us, yet we cannot overlook the anomaly that will exist if the court and the ITC enforce conflicting rules respecting the same documents. Second, the intervenors, original sources of the information in question, are willing for the court to allow disclosure to retained but not to in-house counsel. What they think is important because, if they consider the litigation is conducted in a manner unfair to them and in effect a nontariff barrier to their trade, they could withdraw their marbles from our game and invite their own government to take retaliatory action against United States trade.

Under all the circumstances, Judge Watson well may have thought whatever faults his disposition might suffer from – and hardly could he have imagined it was faultless – alternatives were worse. Factual inquiry into the relationship of in-house counsel with the makers of business policy in their companies, has an appearance, it cannot be denied, of greater fairness. One hopes, but does not much believe, it will not degenerate in practice into an invidious effort to throw doubt on the ability – if not the willingness – of certain members in good standing of the CIT bar, who happen to be currently employed as in-house counsel, to resist pressures to violate protective orders or not to yield "inadvertently." Not in this case, perhaps, but in cases for which this will be a precedent. At best a way is found to prolong the litigation and make it more costly. The CIT judge will have to lay out a pretty rigid method of trial of this issue, one that will keep things within seemly limits and not take forever to implement, thus limiting the damage to what is endurable.

I would be, on remand, inclined to consider seriously adoption of a simple alternative rule which our court majority also seems not to exclude, i.e., if a document is too sensitive to disclose to any counsel of record, in good standing as a member of the CIT bar, it is too sensitive to disclose to any or all other such counsel. This is, I suppose, rejected by the CIT on its theory, as explained by Judge Watson, that the second sentence of 19 U.S.C. § 1516a(b) (2) (13) nullifies the first once the court has examined the material in camera. Apparently the effect of the two sentences is believed to be to achieve practically nothing different from what Fed. R. Civ. P. 26 would effectuate if the Trade Agreements Act of 1979 had said nothing. The court majority here implies something different possibly to be the rule inasmuch as nothing in the second sentence requires grant of access to anyone. The supposed necessity of discriminating between retained and in-house counsel is, or may be, somewhat of a self-created dilemma. While the general rule is that sufficient necessity on the part of the discovering litigant will override any degree of sensitivity, this may not be so where § 1516a(b)(2)(B) is applicable. Such an interpretation would recognize the differences in litigation where foreign traders and governments are so strongly interested in the procedure as well as the outcome, and relieves Congress of the imputation of having enacted futile "weasel" words. The matter has not been briefed and I do not wish to seem to rule upon it, even if, writing as a minority, I could. It seems to me that, without discriminating among counsel or having to decide who is trustworthy, a court might find some other way of dealing with the problem. For example, a court appointed expert, acceptable to both sides for expertise and impartiality, might examine the documents and advise the court as to what they reveal, in sanitized terms sufficient to support a legal conclusion, yet not divulging business or trade secrets.

At any rate, the effect of the decision below, if it had stood, and if United States Steel had still refused to retain outside counsel as the CIT judge hoped it would, is not necessarily denial of justice to United States Steel, but a different thing, denial of the benefit of house counsel's advocacy. If United States Steel's counsel cannot examine these papers, it becomes incumbent on the court to examine them itself, in camera, and arrive at a just and lawful decision using its own very considerable intellectual powers. If this were the result, justice might possibly gain instead of losing, and I say this not meaning to denigrate the benefit to the court of adversary counsel's advocacy. This is a benefit, a great one, but one the court, if it must, can do without.

Appendix D

**UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

**APPLICATION FOR ACCESS TO MATERIAL
UNDER A PROTECTIVE ORDER
FOR OUTSIDE COUNSEL**

1. I, _____, hereby apply for access to protected material covered by the protective order issued in connection with this protest.
2. I am an attorney with the law firm of _____ and have been retained to represent _____, a party to this protest.
3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.
4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decisionmaking as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

5. I identify here (by writing "none" or listing names and relevant circumstances) those attorneys in my firm who, to the best of my knowledge, cannot make the representations set forth in the preceding paragraph:

(Attach additional pages for this and the following questions if needed.)

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances within the last 5 years in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a fine or imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date Executed

Typed Name and Title

Name of Firm

(Revised 2/97)

**UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

**APPLICATION FOR ACCESS TO MATERIAL
UNDER A PROTECTIVE ORDER
FOR IN-HOUSE COUNSEL**

1. I, _____, hereby apply for access to protected material covered by the protective order issued in connection with this protest.
2. I am in-house counsel for _____, a party to this protest.
3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.
4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decisionmaking as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

5. I have attached a detailed narrative providing the following information:

(a) my position and responsibilities as in-house counsel, including my role in providing advice in procurement-related matters;

(b) the person(s) to whom I report, and their position(s) and responsibilities;

(c) the number of in-house counsel at the office in which I work, and their involvement, if any, in competitive decisionmaking and in providing advice in procurement-related matters;

(d) my relationship to the nearest person involved in competitive decisionmaking (both in terms of physical proximity and corporate structure); and

(e) measures taken to isolate me from competitive decisionmaking and to protect against the inadvertent disclosure of protected material to persons not admitted under the protective order.

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

(Attach additional pages for this and the following questions, if needed.)

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances within the last 5 years in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a fine or imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date Executed

Typed Name and Title

Name of Business Entity

(Revised 2/97)

**UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

**APPLICATION FOR ACCESS TO MATERIAL
UNDER A PROTECTIVE ORDER
FOR CONSULTANT**

1. I, _____, am a consultant employed by _____, and hereby apply for access to protected material covered by the protective order issued in connection with this protest.
2. I have been retained by _____ and will, under the direction and control of that attorney, assist in the representation of _____ in this protest.
3. I hereby certify that I am not involved in competitive decisionmaking for or on behalf of any party to this protest or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning or participates in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.
4. My professional relationship with the party for whom I am retained in this protest and its personnel is strictly as a consultant on issues relevant to the protest. Neither I, my spouse, nor any member of my immediate family holds office or a management position in any company that is a party in this protest, or in any competitor or potential competitor of a party.
5. I have attached the following information:
 - (a) a current resume describing my education and employment experience to date;
 - (b) a list of all clients for whom I have performed work within the 2 years prior to the date of this application, and a brief description of the work performed;

(c) a list of all clients for whom my employer has performed work within the 2 years prior to the date of this application and for whom the use of protected material could provide a competitive advantage, and a brief description of the work performed;

(d) a statement of the services I am expected to perform in connection with this protest;

(e) a description of the financial interests that I, my spouse, and/or my family has in any entity that is an interested party in this protest or whose protected material will be reviewed; if none, I have so stated;

(f) a list identifying by name of forum, case number, date, and circumstances all instances in which I have been granted admission or been denied admission to a protective order, or had a protective order admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal; if none, I have so stated; and

(g) a statement of the professional associations to which I belong, including membership numbers.

6. I have read a copy of the protective order issued by GAO in this protest, and I will comply in all respects with all terms and conditions of that order in handling any protected material filed or produced in connection with the protest. I will not disclose any protected material to any individual other than those individuals admitted under the protective order by GAO.

7. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal to be submitted to any agency of the United States government for _____* where I know or have reason to know that any party to the protest, or any successor entity, will be a competitor, subcontractor, or teaming member. *Describe subject of procurement at issue in the protest

8. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal for submission to _____* for _____** nor will I have any personal involvement in any such activity. *Name of contracting agency **Describe procurement at issue in the protest

9. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate disciplinary bodies or professional associations, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a fine or imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date Executed

Typed Name and Title

ATTORNEY'S CERTIFICATION

The consultant named above has been retained by me to assist in the representation of _____ in this protest and will perform his/her duties in connection with this protest under my direction and control.

Signature

Date Executed

Typed Name and Title

Name of Firm

(Revised 2/97)

Appendix E



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

January 1, 1999

Protester's Counsel
Agency's Counsel
Intervenor's Counsel

File No.:	B-123456
Protester:	ABC Corp.
Solicitation No.:	99-999
Agency:	Department

**NOTICE OF LIMITED LEAVE TO RELEASE PROTECTED INFORMATION TO A
FEDERAL COURT**

This notice modifies the terms of the General Accounting Office protective order issued January 1, 1999, in connection with the above-reference protest. The protective order is modified as follows to allow ABC Corp. to use protected material in a suit ABC Corp. intends to file in the United States District Court for the District of Columbia:

1. Protected information obtained pursuant to GAO's protective order must be filed under Seal with the United States District Court for the District of Columbia, and ABC Corp. must request that the Court issue a protective order to cover the information currently under the GAO protective order. Counsel for ABC Corp. remains responsible for any release of information, inadvertent or otherwise, that may occur prior to the Court issuing a protective order covering all the currently protected information.
2. Use of information protected under the GAO protective order will be governed by the protective order issued by the Court. ABC Corp. must provide a copy of the Court's protective order to GAO upon issuance.

All terms of the GAO protective order not otherwise modified by this notice remain in effect.

Assistant General Counsel

Major Contributor to the Guide to GAO Protective Orders

Office of the General
Counsel

Guy R. Petrovito, Senior Attorney

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